IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6156 OF 1996

The Century Textile & Industries Ltd. .. Petitioner

versus

Shri Bhagirathmal D. Sharma & Anr. .. Respondents

...

Mr.C.V. Pavaskar for the petitioner.

Mr.Amol P. Mhatre i/b P.K. Dhakephalkar for the respondent no.1.

CORAM : B.H. MARLAPALLE,J

DATED : 16th September 2005.

ORAL JUDGEMENT :-

1. This petition arises from the order passed by the Industrial Tribunal of Maharashtra at Thane on 10th March 1995 in Application (IT) No.4 of 1989. The petitioner employer had filed the said application under section 33(2)(b) of the Industrial Disputes Act, 1947 (for short "the Act") seeking

approval for the action of dismissal of the respondent employee from service by way of punishment in the pending Reference (IT) No.51 of 1982.

2. The respondent was employed as an attendant in the Bardana Department (of Scrapyard) of the petitioner Company and he was issued a charge-sheet on 17th February 1987 for the acts of misconducts while on duty, under clause No.24(d) and 24(m) of the Model Standing Orders applicable to him i.e. theft, fraud or dishonesty in connection with the employer's business and gross negligence. It was alleged that Truck No. MMS-2411 had come to the factory for loading of scrap material and the respondent employee who was responsible for the supervision of the loading of the said material conspired with the scrap dealer Mr.Insan Ali and Mr.D.B.Waghmare, watchman on duty and loaded additional material namely bearings, m.s. pipe, Copper tubes, brass valve and many other items as listed in the annexure to the charge-sheet. The said truck was checked by the Security Jamadar when it was going out of the factory gate at about 4.30 p.m. on 28th January 1987 and it was found that much more material then what was required to be loaded as scrap the panchnama was drawn in the

presence of the store-in-charge and Security Officer who submitted his report based on which disciplinary action was initiated against the respondent and Mr.Waghmare. Joint enquiry was ordered against both the employees. Mr.Waghmare resigned from the service of the Company and disciplinary proceedings were continued against the respondent. The enquiry Officer submitted his findings on 2nd January 1989 and the order of dismissal came to be passed on 28th August 1989. The approval application u/s.33(2)(b) of the Act came to be filed on the same day before the Industrial Tribunal.

3. By its order dated 3rd September 1991, the Tribunal held that the enquiry conducted into the charges levelled against the respondent was vitiated and the petitioner was directed to lead evidence to prove the charges and lead evidence denovo. Consequently, the management examined three witnesses i.e. Omprakash Joshi - CW no.2, Mr.Jagat Narayan Jha CW no.3 and Mr.Satish Chandra Laroiya CW no.4. The respondent employee examined himself as DW no.1. On perusal of the oral and documentary evidence, the Tribunal concluded that there was no direct evidence against the respondent to hold that he had unloaded

the additional material which was unauthorised. The Tribunal also noted that the respondent was convicted by the J.M.F.C. Ulhasnagar in Criminal Case no. 81 of 1987 and was sentenced to suffer imprisonment till the rising of the Court and a fine of Rs.500/-. The Tribunal reiterated that there was no direct evidence that the respondent employee had engaged himself in commission of the alleged misconduct and therefore, as per the Tribunal, though the procedural requirements were fulfilled by the Company while making the application, the said application was required to be rejected as the charges were not proved.

4. The scope and ambit of the powers u/s.33(2)(b) of the Act has been reiterated by the Constitution Bench in the case of Jaipur Zilla Sahakari Bhoomi Vikas Bank Vs. Shri Ram Gopal Sharma & ors. reported in AIR 2002 SC 643 in the following words :-

> "Whether an application is made under section 33(2)(b) Proviso, the authority before which the proceedings is pending for approval of the action taken by the employer as to examine whether the order of dismissal or discharge is bonafide;

> whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied or not etc."

It is therefore necessary to examine the petitioners' case for approval of the action of dismissal of the respondent employee on the touch stone of law laid down in the case of Jaipur Bank (Supra). It would not be necessary to consider the findings recorded by the Enquiry Officer as well as the evidence leading to the said findings as the Industrial Tribunal has held the enquiry to be vitiated and a denovo enquiry was conducted before the Tribunal into the charges.

It is necessary to examine whether the charges were prima facie proved, the action of the employer in awarding the punishment was bonafide and the employee was not sought to be victimised or there was no case of unfair labour practice at the hands of the employer.

It is therefore necessary to consider the evidence of the petitioner Company through its witnesses and the oral testimony of the respondent so

as to examine whether the charges were reasonably proved.

5. There is no dispute that the respondent was on duty on 28th January 1987 in the general shift and he was responsible for the scrap yard section of Bardana department which was under Mr.Omprakash Joshi, CW No.3 who was working as a Sr.Stores Officer, Mr.Insan Ali, the scrap dealer had brought Truck No.MMS-2411 along with 5 - 6 loaders, a driver and cleaner to take away the scrap as was authorised in terms of the sale note. The general shift duty hours were from 8.15 a.m. to 5.00 p.m. and the truck entered the security gate between 9.30 to 10.00 a.m along with Mr.Insan Ali and his gang. Mr.Waghmare, watchman was assigned the duty to accompany the truck for loading of the authorised scrap material under the supervision of the respondent and accordingly, the respondent employee and Mr. Waghmare were present till the truck was loaded by about 4.00 p.m. At the same time between 00.15 to 1.00 p.m there was a lunch break. In his deposition, Mr.Omprakash Joshi describes the duty of the respondent in the following words :-

> "His duty was to receive scrap from various departments and with the help of workers make lots of the scrap received to segregate them and to keep them lot wife for sale purpose. He has to supervise the sale of the scrap material too when the trucks are coming to the factory for loading. When the lots were ready, he was giving us quantity of the materials for calling the tenders for various scrap materials including scrap material of metal godown No.140 where metal, and ball-bearings and other previous metal which were kept under lock and key and during duty hours, the key of the same godown was always with him from 8.15 to 5 p.m. ..... When the material was being loaded, the opponent had to ensure that goods mentioned in the same lot must be loaded in the truck. He had to remain present their physically to see that no unauthorised goods are being loaded in the truck. The opponent is required to accompany the loaded truck to the weighing bridge and the bring the slip of payment in the office of the Store Officer."

. There is no dispute that the excess and unauthorised material as found in the truck was as listed in the annexure to the charge-sheet and the respondent employee admitted in his depositions before the Tribunal that the work of loading was going on in his presence. However, he denied the charges only by stating in the cross-examination that it was not his duty to remain present and to supervise that proper material should be loaded in the lorry. This was an utterly false plea taken by

the respondent, if regards he had to his duties as a Stores Attendant, in Bardana Department of the Company.

6. The Security Jamadar Mr.Jagat Narayan Jha pointed out the procedure to be followed for the loading of trucks and scrap materials in the following words in his deposition before the Tribunal.

> "When the vehicle comes for collecting scrap material, we take entry of the empty vehicle and its weight is done. When the vehicle reaches the yard, the memo is sent to the security for checking the material to be loaded in the vehicle. The Store Attendants points out that the Watchman as to which material should be loaded. On the basis of the sale note, the lots prepared for the loading are known to the attendant of Bardana Department."

Regarding the instance of 28th January 1987 he stated that the truck of Mr.Insan Ali had come for collecting the scrap as per the memo received, Mr.Waghmare, watchman was sent to the scrap yard along with the truck and loaded vehicle came to the gate between 4.00 to 4.30; the watchman on the gate inspected the vehicle and Mr.Insan Ali was asked to

open the rear plank of the truck but Mr.Insan Ali refused to do so. However, after some time, the driver opened the plank and the Security Jamadar described the extra material noticed by him in the truck as under :-

> "I saw m.s. pipes kept in the truck. Inside the m.s. pipe, there was a stainless steel pipe. When I asked Insan Ali as to how the stainless steel pipe was loaded, though it was not mentioned in the challan, he told me that by mistake, his labours must have loaded it. ON further verification, it was found that three more pipes were inside the m.s.pipes. I told him that it cannot happen by mistake and intention of theft appears from the fact that they were kept inside the m.s. pipes. Then I climbed in the truck. I found a tank kept just behind the driver's cabin and it was steel coated. There were so many gunny bags inside the tank."

After this, the security Jamadar unloaded the truck in presence of Mr.Joshi and Mr.Loraia and sizable quantity of unauthorised material was noticed over and above the scrap material mentioned in the sale note.

7. The Security Officer CW No.4 had ordered personal search of Mr.Waghmare the watchman and a

chit with the telephone number of Mr.Insan Ali was found in his pocket. In his report Exhibit C-28, the Security Officer had noted that on investigations, he gathered that Mr.Waghmare was to meet Mr.Insan Ali at the instance of the respondent after duty hours. It has also come in his evidence that the value of the unauthorised material was in the range of Rs.10,000/- to Rs.12,000/-.

8. Though the respondent was acquitted by the Sessions court, after the impugned order was passed by the Tribunal, that itself would not influence the findings into the charge-sheet issued by the petitioner. The respondent was the store attendant responsible for the Bardana section. It was his duty to ensure that the scrap material was loaded in the truck by the labours of the scrap dealer strictly as per the sale note. The respondent was present throughout when the truck was loaded except the lunch hours and it has come on record that during the lunch break, the truck was not loaded. After the truck was loaded at about 4.30 p.m. he took it to the first weigh bridge then to the other scrap yard and brought it back to the 2nd weigh bridge. Gate slips at

Exhibit.C-14 and C-15 were prepared by him and placed before Mr.Joshi, the Sr.Store Officer. They were signed by Mr.Joshi. The unauthorised material found in the truck was not from any other scrap yard than the Bardana department and obviously, the said truck had gone to the Bardana department for getting loaded as per the sale note and had come back to the Security gate at about 4.30 p.m. after it was cleared by the respondent. If it was the case of the respondent that any of the scrap dealers men were loading the unauthorised material in the truck, he could have immediately complained/reported to Mr.Joshi and in fact, at the first instance, he could have forbidden them from doing so. The rules of evidence are not strictly applicable to the departmental enquiries which are conducted into the charges of misconduct. The guilt of the charge-sheeted employee is required to be gathered from the pre-ponderance of evidence. Mr.Waghmare and the respondent - both were the employees of the petitioner Company but at the same time, the respondent was given the responsibility of loading the scrap dealers truck strictly as per the sale note and he allowed unauthorised material to go into the truck and but for the security check at the exit, the

said material could have escaped. The security Jamadar in his depositions before the Court clearly stated about the reluctance of Insan Ali to open the rear plank of the truck. The unauthorised material which was loaded in the truck clearly went to show that it was by design and not accidentally. The respondent was a party to the said design and therefore, the Management was justified in coming to the conclusion that he connived with the scrap dealer to load unauthorised material. This was nothing short of theft of the Company's property. It is not the case of the respondent employee that he was an office bearer of the Union and he was sought to be targeted or victimised in some way or the other because of his union activities. The tribunal fell in manifest error in holding that the respondent workman was not guilty on the ground that there was no direct evidence. It was not necessary to prove before the Tribunal that the respondent workman had loaded the unauthorised material by his own hands and somebody had seen him while doing so. The Company proved that the unauthorised material was allowed to be loaded in connivance and with specific intentions to cause loss to the Company. This evidence as recorded before the Tribunal prima facie proved the

charges levelled against the respondent vide the charge-sheet dated 17th February 1987 and therefore, the impugned order of the Tribunal rejecting the approval application is unsustainable and deserves to set aside under the powers of superintendence under Article 227 of the Constitution.

9. However, while admitting this petition by the order dated 18th February 1997, this Court refused the prayer for interim relief, possibly on the ground that the respondent was already re-instated pursuant to the letter dated 20th April 1995 addressed to him by the petitioner. There is no dispute that the respondent has been in employment after the impugned order was passed and he is due to retire on 30th September 2005 i.e. within few days. As the approval application was rejected by the impugned dated 10th March 1995, the order of dismissal would be deemed to have not been passed and the employee would be deemed to have continued in service without any interruption from the date of the dismissal order, as per the law laid down in Jaipur Bank (Supra). In the instant case, the order passed by the Tribunal rejecting the approval application has been held to be unsustainable and warrants

interference under Article 227 of the Constitution of India. In the peculiar facts of this case, his dismissal cannot be taken backwards and when he is due for retirement on reaching the age of super annuation towards the end of this month. The learned counsel for the petitioner states that he was not paid the wages for the intervening period and therefore, he has filed complaint ULP no.376 of 1996 for the recovery of wages and the complaint is still pending. The Company has deposited half of the wages in the Industrial Court and the respondent has already withdrawn the same. He would not be entitled for any wages as prayed in the pending complaint. At the same time, no recoveries would be made from him having regards to his impending retirement soon on reaching the age of super annuation on 30th September 2005.

10. In the premises, the petition succeeds and the same is hereby allowed partly. The impugned order passed by the Industrial Tribunal is hereby quashed and set aside, save and except the clarification set out hereinabove and it is made clear that there would not be any recovery from his salary for the period he was reinstated and continued

till his retirement. The amount withdrawn by him from the Industrial Court need not be recovered. The petitioner may apply for the dismissal of the said complaint.

11. Rule is made absolute in the above terms but without any order as to costs.

B.H. MARLAPALLE,J